No. 84-128

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In The

Supreme Court of the United States

October Term, 1983

ALBERT I. BERGLUND,

Petitioner,

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT I. BERGLUND
Petitioner Pro Se
1633 Broadway
15th Floor
New York, New York 10019
(212) 841-8400

Ints Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 221-0008

QUESTIONS PRESENTED FOR REVIEW

[Subject: Federal Insurance Contributions Act (FICA) Administration]

1. Whether wages received after retirement while receiving social security benefits should be obligated to compliance with FICA rules limiting the amount of wages so earned and FICA taxations?

2. Whether wages received at retirement as a pension concurrently with the receipt of social security benefits should have exemption from FICA rules limiting the amount of wages so received as a pension and, further exempt from FICA taxation?

3. Whether, in view of the obvious disparity between FICA administration of the rules; adversely for the unpensioned group (Question 1) and beneficially for the pensioned group (Question 2), and considering the discriminate situation of disadvantage as against advantage, what is to be done toward equity for the unpensioned person group who continue to work for the wages it does not have exempted in the form of and receipt from a pension? Is it to be compliance by all, or exemption by all?

4. Whether the evidence submitted in defense of FICA administration of the rules is responsive to petitioner's complaint?

5. Whether petitioner faulted compliance with the rules and the law, or in the receipt of so-called overpayments of social security benefits?

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No.

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SECRETARY OF HEALTH AND HUMAN SERVICES,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Albert I. Berglund, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered the 12th day of April 1983.

OPINION BELOW

The Court of Appeals entered its opinion affirming the order of the United States District Court, Southern District of New York, dismissing the petitioner's complaint entered August 2, 1982.

JURISDICTION

The Court of Appeals entered judgment affirming petitioner fault in the receipt of social security benefits overpayments and

upheld the propriety of the Social Security Administration's decision to recover the overpayments.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be deprived of property or liberty . . . without having had due process of law.

STATEMENT OF THE CASE

Petitioner's complaint discovers discrimination in the administration of the rules as they relate to the receipt of social security benefits. This distinction occurs between the pensioned person and the unpensioned person, each of whom retire to receive social security benefits while continuing to receive wages; the pensioned person in receipt of deferred wages from a pension fund, and the unpensioned person continuing to work for the current receipt of wages. FICA rules of administration exempt the receipt of wages received from the retirement pension, which is neither obliged to compliance with the limiting rule as to the amount of wages permitted to be received undisturbed concurrently with social security benefits nor are such wages FICA taxed. This situation exempting the pension wages creates a dual adversity against the unpensioned person who must comply with the limiting rule as to the amount of wages and to FICA taxation, wherein the unpensioned person is discovered contributing to a program which exposes his benefits to recovery should wages exceed the limit and, also, supporting the beneficial interest of the pensioned non-contributor who is exempt from these FICA rules.

REASONS FOR GRANTING THE WRIT

Petitioner was not at fault in the pursuit of redress through due process of law, and did report and comply with the rules

and did exhaust all administrative aspects of the appeal route provided within FICA administration. This action is of course the ultimate present here in petitioner's efforts to have equity.

The Circuit Court acknowledged that it has not addressed this precise issue either in affirming the decision of the District Court.

The Circuit and District Courts specifically refer to pensions as unearned income, and rely on the theory that as such it comes within the realm of the prudence of saving for old age and, as such, merits its exempt status under the Consolidated Federal Rules (Title 20, section 404.970; Title 26, section 31.3121). It is not unearned income and is clearly defined as wages, and that such wages are exempt from treatment as such under FICA.

This discriminative situation, which does affect large numbers of people — the pensioned group beneficially — the non-pensioned group adversely, and much so as described hereinbefore. Relief therefrom is provided for in the administrative rules cited above.

As to petitioner's constitutional argument, which is not a prime necessary for the relief sought, there is the protective awareness we all share equally which the Constitution provides against discrimination, or inequitable treatment under our laws.

The Circuit Court states it to be reasonable to deduct FICA taxes on the current wages of the unpensioned person, but states that FICA taxing deferred wages from pensions would be irrelevant and contrary to the FICA program of providing support for the pensioned person. This is unreasonable because it supports supporting the pension wages which are already protected and secure of any obligation while that of the non-pensioned person is adversely affected, as unprotected.

The judgments on appeal erroneously construe pensions to be derived from the prudence of savings which, as to this case, is not the fact. The pertinent bearing of the subject of pensions within the meaning of FICA administration are clearly defined as wages and not savings or unearned income and, as such, is clearly exempted from the obligations imposed upon the unpensioned person group who continue to work for the need of added income, as much so as the pensioned person depends upon the deferred wages received from such pension after retirement. The difference between the pensioned and unpensioned group is the simple absence of the encumbrance of FICA rules upon the pensioned group and the complete presence of the FICA rules as an encumbrance and an added tax which is not imposed upon the receipt of pension wages received by the pensioned group.

CONCLUSION

For the foregoing reasons, petitioner submits that a writ of certiorari should issue to review the judgment of the United States Court of Appeals.

Respectfully submitted,

ALBERT I. BERGLUND
Petitioner Pro Se

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 12 day of April, one thousand nine hundred eighty-three.

P R E S E N T:

HONORABLE WALTER R. MANSFIELD,

HONORABLE THOMAS J. MESKILL,

HONORABLE JON O. NEWMAN,

Circuit Judges.

FILED APRIL 12, 1983
A. Daniel Fusaro, Clerk

Docket No. 82-6247

ALBERT I. BERGLUND,

Plaintiff-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

Appendix A

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Pollack, J., granting the defendant Secretary's motion for summary judgment.

This case arose out of the Secretary's attempt to recover overpayments of social security benefits. Berglund claims on this appeal as he did in the district court that the distinction between the treatment of earned income vis-a-vis pension income is unconstitutional discrimination against unpensioned retirees.

The challenged distinction does not involve a fundamental right or a suspect class and therefore satisfies equal protection requirements as long as there is a reasonable basis in the purpose of the legislation. *Dandridge v. Williams,* 397 U.S. 471, 484-85 (1970). The purposes of the social security old-age retirement benefits legislation include compensating individuals for earnings lost because of retirement, *Mathews v. DeCastro,* 429 U.S. 181, 185-86 (1976), and encouraging retirement, *Ludeking v. Finch,* 421 F.2d 499, 503 (8th Cir. 1970). A policy of deducting part of a claimant's earnings from his benefits is consistent with these purposes. The same policy with respect to pension income would be irrelevant or contrary to them. Consequently, the distinction is constitutionally sound and the district court properly upheld the Social Security Administration's decision to recover the overpayment.

ON CONSIDERATION THEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is affirmed.

s/ Walter R. Mansfield
Walter R. Mansfield, U.S.C.J.

Appendix A

s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

s/ Jon O. Newman
Jon O. Newman, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

Berglund v. Schweiker 82 Civ. 1799 (MP) PRO SE

Plaintiff, a *pro se* litigant, moves for summary judgment on his claims for declaratory and injunctive relief in which he seeks, in effect, to have certain provisions of the Social Security Act and regulations thereunder declared unconstitutional and to recover benefits withheld by the Social Security Administration (SSA) and to prevent further withholding of benefits. The defendant cross-moves for summary judgment. For the reasons stated hereinafter, this Court denied plaintiff's motion and grants summary judgment to defendant.

The SSA overpaid plaintiff and his wife in retirement insurance benefits for the years 1977 and 1978. The overpayments were due to the fact that plaintiff had post-retirement earnings for each of those years in excess of that allowed free of offset against benefits, *see* Sec. 203(b) of the Social Security Act, 42 U.S.C. §403(b), and the SSA had not withheld any benefits to reflect those earnings. The SSA determined that plaintiff was not without fault with respect to the overpayments and therefore that recoupment would not be waived. Sec. 204(b), 42 U.S.C. §404(b). Plaintiff was advised that future benefits would be reduced until the overpayments were recovered.

After exhausting his administrative remedies, (i.e. plaintiff, representing himself, received a hearing before an Administrative Law Judge (ALJ) and was denied a review of the ALJ's decision by the Appeals Council), plaintiff instituted this suit. He argues that the statutory provision and applicable regulations requiring

that post-retirement wages be offset against retirement insurance benefits but which do not require that pension funds be so offset discriminate unconstitutionally against unpensioned retirees.

The ALJ's determination that plaintiff "accepted these overpayments when he knew or should have known that the law did not permit such overpayment" is supported by substantial evidence on the record. Plaintiff admitted at the hearing that overpayments had been made and claimed to be without fault only in that he had cooperated throughout with the SSA, and had not hidden his earnings from them. His occupation as a life insurance salesman with a well-established firm, his articulateness and sophistication evidenced in his behavior at the hearing, and his ability to fill out his own social security applications, were all factors which the ALJ could properly take into account in determining that plaintiff accepted the payments knowing that they should have been reduced to reflect his post-retirement earnings. Plaintiff had been specifically informed when first applying for these benefits that post-retirement earnings above a certain amount were to be offset against benefits.

Plaintiff's constitutional argument is without merit. "[I]nsofar as the provision challenged is in the area of social welfare and neither infringes upon a fundamental right nor utilizes classifications that are suspect, the question of constitutionality must be measured by the traditional rational basis standard." *Miller v. Department of Health and Human Services,* 517 F. Supp. 1192, 1194 (E.D.N.Y. 1981) (denying *pro se* litigant's challenge to defendant's decision that social security benefits payable to him as widower's insurance must be reduced to reflect the amount of his civil service pension.) *See also Colby v. Harris,* 622 F.2d 644 (2d Cir.) (per curiam), *cert. denied* 449 U.S. 900 (1980); *Cook v. Harris,* 617 F.2d 906 (2d Cir. 1980).

Appendix B

The distinction challenged here, — that between wage earners and those receiving income from pensions or annuities, is ground squarely in the wording of the statute, Sec. 203(b) and (f), 42 U.S.C. §403(b) and (f), and bears a rational relationship to Congress' purpose in encouraging retirement and savings for that retirement. Though this Circuit has not addressed this precise issue, the reasoning of the District Court of Massachusetts, explicitly followed by the Fifth Circuit, is persuasive.

> Congress has a rational basis for not providing for deductions for unearned income. First, unearned income has little relevance to the central purpose of a retirement benefit system intended to compensate for loss of earned income. Second, unearned income plays no part in the taxation or other aspects of the old age benefit system. Third, to make a deduction would create disincentives to saving. As Secretary Cohen, in the letter previously quoted, noted "if benefits were withheld because the person had income from savings, investments, *a private pension plan* or the like, the program would discourage people from saving in their productive years to have a more comfortable life in retirement than social security benefits alone can make possible." Fourth, if deductions were to be made for unearned income a new set of problems of administration, valuation, computation and reporting would be presented.

Gainville v. Richardson, 319 F. Supp. 16, 19 (D. Mass. 1970), followed in *Carlough v. Richardson,* 445 F.2d 864 (5th Cir. 1971) (per curiam), *cert. denied* 404 U.S. 1026 (1972).

Appendix B

For the foregoing reasons, summary judgment is granted in favor of the defendant.

Complaint dismissed.

SO ORDERED

August 2, 1982

Milton Pollack
U.S. District Judge